IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

SHERIFF DAVID WARREN'S MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Counsel for Defendant, Sheriff Warren:

Fred D. Gray (GRA022)
Fred D. Gray, Jr.(GRA044)
Gray, Langford, Sapp, McGowan, Gray & Nathanson
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone:334-727-4830
Facsimile:334-727-5877
fgrayjr@glsmgn.com

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SUMMARY OF THE ARGUMENT

The Court should grant summary judgment in favor of Sheriff Warren because no material issue of fact exists and because Sheriff Warren is entitled to judgment as a matter of law given that: (1) the Plaintiffs' equal protection claims are not justiciable; (2) the regulations which Plaintiffs have challenged are rationally related to a legitimate governmental interest; and, (3) Sheriff Warren has not treated the Plaintiffs in an unequal manner. The Plaintiffs have asserted a single claim for violation of the equal protection clause of the Fourteenth Amendment; however, those claims are not justiciable because the Plaintiffs do not have standing based upon a lack of redressability and because the Plaintiffs failed to exhaust administrative remedies. Even if the Plaintiffs' equal protection claims were justiciable, the bingo licensing regulations that the Plaintiffs challenge are rationally related to legitimate police power objectives in regulating gambling while providing economic support to legitimate charities. Finally, Sheriff Warren has not treated the Plaintiffs in an unequal manner because the Plaintiffs are not similarly situated to those entities who have been granted licenses. Namely, the Plaintiffs do not satisfy the requirements for a license apart from the three specific requirements that Plaintiffs have challenged. For these reasons, the Court should reject the Plaintiffs' equal protection claims and grant Sheriff Warren's Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Not every factual dispute will defeat summary judgment as the disputed fact must be material to the outcome of the issue before the court. See McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1243 (11th Cir. 2003). Materiality, in turn, is determined by the relevant substantive law. See id. at 1243.

NARRATIVE STATEMENT OF UNDISPUTED MATERIAL FACTS

I. PROCEDURAL HISTORY

Plaintiffs Reach One, Teach One of America, Inc. ("Reach One") and Macon County Investments, Inc. ("MCII") filed their initial Complaint in this matter on March 9, 2006. (Doc. 1.) Along with the Complaint, Plaintiffs also filed a Motion for Early Commencement of Discovery (Doc. 2) and Application for Preliminary Injunction and Expedited Hearing (Doc. 3). Plaintiffs alleged that MCII "had purchased land for the facility, began construction of the facility and negotiated financing to purchase games for the operation of the facility." (Doc. 1, Comp. at ¶17.) In their Application for Preliminary Injunction, Plaintiffs claimed that: "Plaintiffs began constructing the facility and purchasing equipment for the operation of a Class B Bingo facility in Macon County." (Application at ¶ 10, Doc. 3.) Plaintiffs also alleged that their "[b]usiness reputation, goodwill and income are being diminished every day that the purchased equipment is not in use and the land remains undeveloped. Further, the public service goals of the MCI/Reach One, Teach One venture are being frustrated because no funds are being generated." (Application at ¶ 11, Doc. 3.)[1] Sheriff Warren responded by filing a Motion to Dismiss (Doc. 8), Brief in Support of Motion to Dismiss (Doc. 9), Response to Motion for Expedited Discovery (Doc. 10), and Response to Application for Preliminary Injunction (Doc. 11) on April 3, 2006. On June 26, 2006, this Court entered an Order denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, denying Sheriff Warren's Motion to Dismiss, and permitting expedited discovery. (Doc. 19.) This Court's June 26th Order dismissed MCII from this case but gave the Plaintiffs leave to amend the Complaint to "properly identify the status of Macon County Investments, Inc. for purposes of standing." (Doc. 19 at pg. 9).

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[1]The president of MCII later admitted in his deposition that no equipment had ever actually been purchased and that construction on the facility had not begun. (Thomas 233:1-23). In fact, Plaintiffs later admitted in deposition that they had no assets or finances to construct the facility. (Thomas 229: 2-8)

Plaintiffs Reach One and MCII filed their Amended Complaint on June 28, 2006 which substantially repeats all of the allegations contained in the Original Complaint. (Doc. 20.) Plaintiffs added three paragraphs which sought to address MCII's standing. Specifically, Plaintiffs alleged that both Reach One and MCII "jointly" applied for a Class B Bingo License and that they were both entitled to a Class B Bingo License if they prevailed. (Doc. 20) Sheriff Warren filed a Motion to Dismiss the Amended Complaint and a Brief in Support on July 18, 2006 explaining that Amendment No. 744, and the Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, only provide for the licensing of a nonprofit organization for the conduct of bingo pursuant to a Class B Bingo License[2]. (Doc. 26, 27.) On August 15, 2006, Plaintiffs filed their Response in Opposition to Motion to Dismiss. (Doc. 31.) On that same date, Plaintiffs also took Sheriff Warren's deposition.

On August 16, 2006, Plaintiffs filed a Motion to Shorten Time and Motion for Third Party Discovery. (Doc. 32, 33). Two days later, on August 18, 2006, Sheriff Warren took the depositions of Walter Walker, Reach One's corporate representative, and Frank

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[2]Amendment No. 744 provides: "The operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County." A "nonprofit organization" is defined in Section 1(d) of all versions of the Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County as: "a bona fide organization for charitable, educational, or other lawful purposes which operates ***without profit*** to its members and/or which has been classified by the Internal Revenue Service as a tax exempt organization." (emphasis added.)

Thomas, MCII's corporate representative. (Deposition of Frank Thomas, Deposition of Walter Walker.)[3] Sheriff Warren then filed a Response to Plaintiffs' Motion to Shorten Time on August 20, 2006. (Doc. 35.) In that Motion, Sheriff Warren objected to any request to shorten his time for responding to Plaintiffs' discovery requests and also presented testimony from the depositions of Plaintiffs' own corporate representatives that certain allegations in Plaintiffs' Complaint, Amended Complaint, Application for Preliminary Injunction, and Motion for Expedited Discovery were false. (Doc. 35.)

Magistrate Judge Charles Coody held a hearing on pending discovery motions on August 24, 2006. (Doc. 37.) As a result of that hearing and after conferring with this Court, Judge Coody issued an Order vacating the earlier order permitting expedited discovery, placing the case back on the regular track for discovery, ordering the parties to submit a report of parties planning meeting by September 7, 2006, and instructing the parties that discovery should be recommenced once the court entered a scheduling order. (Doc. 38). On September 7, 2006, the parties submitted their Report of Parties Planning Meeting. (Doc. 40.)

Thereafter, on January 17, 2007, this Court entered an Order denying Sheriff Warren's Motion to Dismiss Plaintiffs' First Amended Complaint. (Doc. 44.) This Court then held a scheduling conference on February 15, 2007. (Doc. 48, 50.) Most recently, this Court issued a Scheduling Order on March 8, 2007 and set the trial date in this matter for October 15, 2007. (Doc. 50.)

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[3]The deposition excerpts of Frank Thomas are attached as Exhibit 1 and will hereafter be referred to as "Thomas depo." The deposition excerpts of Walter Walker are attached hereto as Exhibit 2 and will hereafter be referred to as "Walker depo." All Exhibits are attached to Sheriff Warren's Motion for Summary Judgment.

II. REGULATORY HISTORY

The operation of bingo games for prizes or money by nonprofit organizations is authorized by the Constitution of Alabama, 1901, Amendment No. 744.[4] The Alabama Legislature passed Act No. 2003-124 on June 1, 2003 which proposed Amendment No. 744 and called for a referendum by the people of Macon County. The voters of Macon County overwhelmingly approved Amendment No. 744 in a referendum on November 3, 2003. (Warren Aff. at ¶ 7.)[5] Amendment No. 744 provides in part that: "The operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County." In accordance with the authority granted to him by the constitutional amendment, the Sheriff promulgated the "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" on December 5, 2003. ("2003 Rules")[6]. Amendment No. 744 and the Macon County Bingo Rules provide for the licensing of a nonprofit organization for the conduct of bingo. (Amend. No. 744 at § 1, 1(2); 2003 Rules at §§ 2, 3.) Amendment No. 744 also permits a nonprofit organization to contract with another entity to operate the games. (Amend. 744 at § 1(4).)

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[4]A copy of Amendment No. 744 is attached as Exhibit 3.

[5]Affidavit of Sheriff Warren attached to the Motion as Exhibit 4 and hereafter referred to as "Warren Aff." Sheriff Warren also attaches a chart (his Exhibit C) which provides the names of all Class B Bingo licensees, the number of the license, the date on which the license was issued, the expiration date for each license, and the total number of licenses issued by month from December 2003 through March 2006

[6]A copy of the 2003 Rules is attached as Exhibit 5.

A. 2003 BINGO RULES

Section 3 of the 2003 Rules provided that: "No nonprofit organization, as defined herein, shall be allowed to operate a bingo game unless the Sheriff first issues a license to said organization authorizing it to do so." A "nonprofit organization" is defined in Section 1(d) as: "a bona fide organization for charitable, educational, or other lawful purposes which operates without profit to its members and/or which has been classified by the Internal Revenue Service as a tax exempt organization."

The 2003 Rules provided for two types of bingo licenses: Class A Bingo license for the conduct of paper bingo, and Class B Bingo license for any and all games of bingo (including electronic bingo). (2003 Rules at § 1). In order to obtain a Class B Bingo license, the nonprofit organization had to complete an application and submit the application package to the Sheriff for approval or denial. (Id. at §§ 2, 3). The holder of a Class B Bingo license could only conduct bingo games at a "qualified location" in Macon County. (Id. at § 1(h).) The 2003 Rules defined a "qualified location" as a location that had been inspected and approved by the Sheriff and which had submitted satisfactory evidence of the following:

(I) public liability insurance in an amount not less than $5,000,000.00;

(ii) if liquor is served, liquor liability insurance in an amount not less than $1,000,000.00;

(iii) adequate parking for patrons and employees;

(iv) onsite security as prescribed by the Sheriff;

(v) onsite first aid personnel as prescribed by the Sheriff;

(vi) cash or surety bond in an amount not less than $1,000,000.00;

(vii) such accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons;

(viii) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements (before depreciation) comprising said location or the value of said land, building and other capital improvements (before depreciation) must be at least $5,000,000.00;

(ix) satisfactory evidence that the location is fully compliant with the Americans with Disabilities Act ("ADA");

(x) satisfactory evidence that the owner or owners of such location have been residents of the State of Alabama for at least three (3) years.

(Id. at § 1(j)). The 2003 Rules also established an appeal process for the denial of an application. (Id. at § 14.) Section 14 provided that any nonprofit organization whose application for a license has been denied "shall have the right to appeal such denial to the Macon County Commission and to the Circuit Court of Macon County." (Id.)

After the Sheriff promulgated the 2003 Rules, he issued 12 Class B Bingo licenses in December 2003 to nonprofit organizations who had contracted with Victoryland to conduct the bingo games on their behalf. (Warren Aff. at ¶ 11, 12.) Each of those nonprofit organizations submitted a completed application, the requisite license fees, and satisfactory evidence that Victoryland was a "qualified location." (Id. at ¶ 13.) Between January 1, 2004 and June 1, 2004, the Sheriff issued another 17 Class B Bingo licenses. (Id. at Exhibit C.) Reach One was not among the nonprofit organizations who submitted an application for Class B Bingo

B. 2004 AMENDMENTS TO THE BINGO RULES

On June 2, 2004, the Sheriff amended the 2003 Rules and issued the First

Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County ("2004 Rules")[7]. When the Sheriff promulgated the 2004 Rules, he included a "Commentary to Amended and Restated Bingo Regulations." (2004 Rules, Commentary.) The Commentary highlighted the amendments to the 2003 Rules and explained the rationale behind the decision to amend the 2003 Rules:

> Having had the opportunity to evaluate and regulate the licensing and operation of bingo games in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama, the Macon County Bingo Regulations are hereby amended and restated in their entirety in order to maintain, protect and enhance the integrity of, the viability and the economic benefit derived from, bingo games for the eligible nonprofit organizations in Macon County that offer material charitable and educational purposes in Macon County, Alabama. . .

(2004 Rules, Commentary.) The 2004 Rules were published in *The Tuskegee News* on June 10, 2004.[8]

The Sheriff made seven amendments to the 2003 Rules that sought to strengthen and protect the integrity of bingo games conducted by nonprofit organizations: (1) added provision to definition of "nonprofit organization" to clarify that organization must be active and in good standing; (2) increased the capital investment requirement to $15 million; (3) required a minimum of 15 nonprofit organizations to obtain Class B Bingo licenses prior to authorizing bingo to be conducted at a qualified location; (4) increased license fee for a qualified location from $40,000 to $250,000; (5) increased the single prize limitation; (6) added provision regarding transportation of bingo equipment; and (7) provided that the amendments became effective June 2, 2004 (except provision increasing license fee which took effect January 1, 2005). (2004 Rules, Commentary.) The Plaintiffs only challenge two of the amendments: (1) the $15 million capital investment requirement, and (2) the requirement that at least 15 nonprofit organizations obtain Class B Bingo licenses prior to conducting a bingo operation at a qualified location. (Comp. at ¶ 11)(2004 Rules §§ 1(j) and 2.)

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[7]A copy of the 2004 Rules is attached as Exhibit 6.

[8]A copy of the *Tuskegee News* article is attached as Exhibit 7.

The Sheriff explained in the Commentary that the increased capital investment requirement was necessary in order to: "require a qualified location to prove a significant investment and financial commitment to Macon County prior to becoming a 'qualified location'." (2004 Rules, Commentary.) The Sheriff also explained his reasoning for requiring at least fifteen nonprofit organizations to obtain Class B Bingo licenses prior to authorizing Class B Bingo at a "qualified location":

> In order to maximize economic benefits to numerous nonprofit organizations in Macon County and to further avoid the potential abuse of a third party individual or business entity from using one nonprofit organization (or a minimal number) as a "front" to operate bingo games under a Class B License. . . By requiring at least fifteen (15) nonprofit organizations to obtain a Class B License prior to authorizing such a bingo operation at a qualified location, assurance is provided that a large representative group of charities is afforded the opportunity to obtain the economic benefits associated with a Class B License.

(2004 Rules, Commentary at § 2.) At the time the Sheriff promulgated the 2004 Rules, only 29 Class B Bingo licenses had been issued. (Warren Aff. at Exhibit C.)

Plaintiffs erroneously claim in their Amended Complaint that "[t]he Sheriff issued no additional Class B Bingo Licenses or authorized any additional facilities under the First Amended Rules." (Amended Comp. at ¶12, Doc. 20.) However, between June 2, 2004, when he issued the 2004 Rules, and December 31, 2004, the Sheriff approved 10 Class B Bingo licenses to nonprofit organizations who contracted with Victoryland to conduct the bingo games, tendered the required license fees, and submitted satisfactory evidence that Victoryland was a "qualified location." (Warren Aff. at ¶ 17 and Exhibit C.) In December 2004, the Sheriff issued 39 renewal licenses for Class B Bingo licenses for nonprofit organizations conducting bingo at Victoryland. (Warren Aff. at ¶ 18.) Sheriff Warren did not approve any additional qualified locations after he promulgated the 2004 Rules (First Amended Rules) **because no nonprofit organization applied** for a Class B Bingo license that designated any other facility in Macon County during the six months between the promulgation of the 2004 Rules and January 1, 2005. (Id. at ¶ 21.)

C. 2005 AMENDMENTS TO THE BINGO RULES

On January 1, 2005, the Sheriff issued the Second Amended and Restated Bingo Regulations ("2005 Rules")[9]. (Comp. at ¶ 13.) The 2005 Rules contained three amendments which: (1) amended the definition of bingo to reflect the current definition of bingo as acknowledged by the Alabama Attorney General; (2) limited the number of Class B Bingo licenses which could be issued to 60; and (3) allowed licenses to be issued that are valid for five years rather than one year. (2005 Rules.) The 2005 Rules and the Commentary were published in *The Tuskegee News* on December 30, 2004.[10] The Plaintiffs object to only one of the three amendments in the 2005 Rules– the amendment which provides that at no time shall there be more than 60 Class B Bingo licenses in Macon County. (Amended Comp. at ¶ 13, Doc. 20.)

When the Sheriff promulgated the 2005 Rules, he also wrote a Commentary in which he explained the reasons for the amendments:

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[9]A copy of the 2005 Rules is attached as Exhibit 8.

[10]A copy of the *Tuskegee News* article dated December 30, 2004 is attached as Exhibit 9.

> The Attorney General for the State of Alabama has recently conducted an exhaustive investigation and review of gaming activities in the State of Alabama, including but not limited to, bingo games conducted in Macon County, Alabama, pursuant to Amendment No. 744 of the Constitution of Alabama. In response to the Attorney General's recent findings and pronouncements, the [2004 Rules] are hereby amended and restated to comport and comply with the Attorney General's definition of bingo games and policy to limit Class B bingo gaming activities in Macon County, Alabama, at a reasonable level whereby the Sheriff can more adequately and effectively regulate and enforce the proper conduct of such bingo games. Accordingly, the following changes have been made to the Macon County Bingo Regulations:
>
> * * *
>
> Section 2: A new sentence has been added to the end of Section 2 to limit the number of Class B Licenses that may be issued in order to follow the policy of the Attorney General to limit Class B bingo gaming activities in Macon County, Alabama, and to allow the Sheriff to more effectively regulate and enforce the proper conduct of such bingo games.

(2004 Rules at pg. 13.) As of January 1, 2005 when the 2005 Rules became effective, only 39 Class B Bingo licenses had been issued. (Warren Aff. at Exhibit C.) In February 2005, the Sheriff approved an additional 14 Class B Bingo licenses bringing the total Class B Bingo licenses to 53. (Warren Aff. at Exhibit C.) In April, May, and June 2005, the Sheriff issued another six Class B Bingo licenses for a total of 59. (Id.)

III. PARTIES

Plaintiff MCII was not formed and incorporated until June 2, 2005, after the Sheriff had already issued Class B Bingo licenses to 57 nonprofit organizations. (Comp. at Ex. 4, Doc. 1) (Warren Aff. at Exhibit C). Plaintiff MCII is a for-profit organization "doing business in Macon County as a real estate development company." (Comp. and Amended Comp. at ¶ 2.) MCII filed its Articles of Incorporation with the Macon County Judge of Probate on

July 14, 2005. (*Id.* at Ex. 4.) Six days later, on July 25, 2005, Plaintiff Reach One (Reach One) applied for a Class B Bingo license and designated Plaintiff MCII to be its "qualified location." (Amended Comp. at ¶ 15, Doc. 20.)

Even though Sheriff Warren contends that Plaintiff Reach One's application must meet all of the requirements set forth in the 2005 Rules, Plaintiff Reach One's application package was deficient even under the 2003 Rules which Plaintiffs do not challenge. Plaintiff Reach One's application lacked the following: (1) proof of public liability insurance; (2) liquor liability insurance; (3) adequate parking; (4) onsite security; (5) onsite first aid personnel; (6) accounting procedures, controls and security; (7) evidence of a $5,000,000.00 capital investment; (8) evidence that the location was compliant with the ADA; (9) complete information regarding the officers and directors of Reach One; and (10) a tender of the Class B Bingo license fee. (Warren Aff. at ¶ 24, 25.)

It is clear from the testimony elicited during the deposition of MCII's corporate representative, Frank Thomas ("Thomas"), that: (1) MCII never had a facility that could be inspected by Sheriff; (2) Reach One would not be eligible to obtain a Class B Bingo license even under the 2003 Rules; (3) MCII could not meet the definition of a "qualified location" even under the 2003 Rules; (4) MCII is not similarly situated to the other qualified location; and (5) neither Reach One nor MCII has suffered any losses whatsoever as a result of Sheriff Warren's actions.

A. MACON COUNTY INVESTMENTS, INC.

Frank Thomas, MCII's corporate representative, first became aware of bingo in late 2003 or early 2004 after bingo passed. (Thomas depo. at 68:10 - 69:3; 71:21 - 72:3.) He noticed the increase in traffic around Victoryland, the first qualified location in Macon

County, and it got his attention. (Thomas depo. at 69:4-16; 70:13-20.) Thomas admitted that nothing stopped or prevented him from participating in charitable bingo in 2004 or 2005. (Thomas depo. at 75:16 - 76:13.) Thomas admitted that between November 2003 (when Amendment No. 744 was passed) until May 2005 he did not try to begin participating in charitable bingo because he did not have the experience to build and operate a facility. (Thomas depo. at 79:13 - 80:12; 232:21 - 233:4.)

Thomas began in earnest to pursue charitable bingo in the spring of 2005, several months after the passage of the 2005 Rules. (Thomas depo. at 89:1-14; 91:17- 92:4.) In April or May 2005, Thomas understood that there was not an application for a qualified location and that only a charity could apply for a bingo license. (Thomas depo. at 80:3 - 81:21.) During that time period, he began soliciting charities to participate in bingo.

Thomas first went to James Lane ("Lane"), an insurance agent in Montgomery, because he thought Lane could help him line up a charity. (Thomas depo. at 92:5 - 93:19.) Thomas signed a contract with Lane dated December 16, 2004 in which Lane agreed to secure fifteen charities to apply for Class B Bingo licenses.[11] In exchange for securing fifteen charities, Lane was to receive $250,000. (Lane Contract at ¶ 4.) Once the charities applied for and received Class B Bingo licenses, Lane was to receive another $250,000 along with a five percent interest in the entity that operated the games and a right of first refusal to construct a hotel adjacent to the proposed facility. (Lane Contract at ¶ 4, 8.)

Thomas also hired Tom DeBray, an attorney in Montgomery, to help him locate a charity. (Thomas depo. at 94:11-22; 95:16 - 96:1.) Tom DeBray and Lane put Thomas

[11] A copy of the contract is attached as Exhibit 10 and hereinafter referred to as the "Lane Contract."

in touch with Johnny Ford ("Ford"). (Thomas depo. at 94:11-13.) Ford served as Mayor of Tuskegee at the time. (Thomas depo. at 91:5-8.) According to Thomas, Ford gave Tom DeBray a "black book" of charities. (Thomas depo. at 100:1-14; 101:15-22.) Greg Carr ("Carr"), Thomas's business partner and attorney, went through the "black book" and chose Reach One as a potential charity. (Thomas depo. at 104:21 - 105:8; 106:18-23.)

In the Spring of 2005, Carr, Thomas, and Ford contacted Reach One. (Thomas depo. at 90:1 - 91:8; 107:12-17.) Carr and Thomas reached an agreement with Walter Walker ("Walker"), the president of Reach One, that Reach One would apply for the Class B Bingo license and designate MCII as its qualified location. (Thomas depo. at 117:3 - 118:10.) Thomas and Carr promised Walker that if Reach One obtained a license and MCII was its operator, then MCII would pay Reach One a bingo session fee of $15,500. (Thomas depo. at 119:7-19.) Thomas admitted that he only approached one charity even though he knew that the 2005 Rules required a minimum of fifteen and even though he paid Lane $250,000 to find fifteen charities. (Thomas depo. at 166:21 - 167:4.)

MCII was subsequently formed and incorporated on June 2, 2005. (Comp. at Ex. 4.) Thomas and Carr are the only shareholders in MCII. (Thomas depo. at 52:5-7; 241:17-20.) They never paid any money for the stock in MCII or contributed any money into the company. (Thomas depo. at 52:10-23; 53:1-23; 54:1-9.) MCII has no assets, no liabilities, no bank accounts, no property, no equipment, and no facility of any kind. (Thomas depo. at 50:3-10; 51:17-23; 52:1-4; 54:1-9.) On June 2, 2005, Thomas entered into an option contract with MCII to sell a 56 acre tract of land to MCII for $10,000,000.00.[12]

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[12] Thomas personally purchased a one-third interest in a 261 acre tract of real estate in Macon County on September 25, 2001 for $126,396.50. (A copy of the purchase

(Thomas depo. at 31:10 - 32:5.) MCII filed its Articles of Incorporation with the Macon County Judge of Probate on July 14, 2005. (Comp. at Ex. 4.) On July 25, 2005, Plaintiff Reach One applied for a Class B Bingo license and designated Plaintiff MCII to be its "qualified location." (Comp. at Exhibit 1.) Plaintiff MCII was formed, and Plaintiff Reach One's bingo application was filed six months after the Sheriff issued the 2005 Rules.

On September 22, 2005, Thomas personally signed a "Preliminary Term Sheet for Discussion Purposes Only" with Gaming Capital Group to provide two thousand electronic bingo machines for $30 million if MCII is able to obtain an operator's license.[13] However, the Term Sheet was a proposal not a binding contract. (Exhibit 14.) Based upon the documents produced in discovery by Plaintiffs, neither Thomas nor MCII has paid any money or incurred any liability as a result. (Exhibit 14; Thomas depo. at 234:9-23.)

Thomas also personally borrowed $1 million from his college fraternity brother on February 24, 2006 to fund this lawsuit against Sheriff Warren. (Thomas depo. at 194:15-195:10). Thomas testified that after he signed the note for the $1 million loan, the money was paid directly to Donald Watkins for consulting services. (Thomas depo. at 198:4-200:20). Watkins was to serve as a consultant, not an attorney, for MCII. (Thomas depo. at 199:13-19). Watkins duties were to put together a legal team and "coordinate the legal

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contract is attached as Exhibit 11.) Thomas personally purchased the remaining two-thirds interest in the tract for $1 million on July 20, 2004. (A copy of the purchase contract is attached as Exhibit 12.) Thomas then entered into the June 2, 2005 contract with MCII to sell 56 of those 261 acres to MCII for $10,000,000.00. (A copy of the contract with MCII is attached as Exhibit 13.) The contract is dated June 2, 2005. MCII proposes to construct a facility where it could conduct bingo on the 56 acre tract. However, title to the 56 acre tract for the proposed facility has always been and currently is in Frank Thomas's name personally. (Thomas depo. at 29:12-13.)

[13] A copy of the Preliminary Term Sheet is attached as Exhibit 14.

battle for [MCII] to move forward in Macon County." (Thomas depo. at 201:18-20). Although Thomas testified in his deposition that he had a written contract with Watkins and that he paid Watkins $1 million to provide consulting services to MCII, Thomas failed to produce in discovery either the consulting agreement or copies of the checks issued to Watkins. (Thomas depo. at 201:11-15).

Thomas estimated that the proposed facility would cost approximately $20-30 million to build. (Thomas depo. at 269:18 - 270:16.) When he included the cost of placing electronic bingo machines in the proposed facility, he estimated the cost of the facility plus machines would be approximately $60-70 million. (Id.) Interestingly, MCII admits that it does not have the assets or finances to construct the facility. (Thomas depo. at 229:2-8.) MCII does not even have a bank account in which to deposit or disburse funds. (Thomas depo. at 51:17-19.) At the same time Thomas was trying to find a charity, he embarked on an effort to persuade the Sheriff to either guarantee them a license or to change the bingo rules so that they could qualify (Thomas depo at 161:8-13.).[14]

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[14]Indeed, Plaintiffs have gone to great lengths to "pressure" the Sheriff into granting them a license including attempting to sully the Sheriff's reputation at his deposition by insinuating that the Sheriff has taken money from Milton McGregor (the President and CEO of Victoryland) . Plaintiffs presented a copy of a check during Sheriff Warren's deposition representing that the check was one from Milton McGregor to Sheriff Warren for $5,000 allegedly drawn on an account with Sterling Bank as some type of "personal gift or payment for services" that he received one month before the 2004 Rules were issued. (Deposition excerpts of Sheriff Warren attached as Exhibit 15 at 294:8- 297:20). However, Sheriff Warren denied ever receiving any money from McGregor; the check actually bears the legend "Milton McGegor"; McGregor has never had an account with Sterling Bank; and, the routing number and account number on the check have been obliterated. (Affidavit of Robert Ramsey attached as Exhibit 16.) Indeed, the only party to this litigation to ever have an account with Sterling Bank is Frank Thomas. (Thomas depo. at 178:19-20.) Thomas claims that the check was anonymously deposited into the mail slot at Carr's office. (Id. at 170:3 - 171:7.)

First, Thomas hired Bobby Segall, an attorney in Montgomery and personal friend of Sheriff Warren and Sheriff Warren's wife, and Joe Turnham, the chairman of the Alabama Democratic Party, "to talk to the Sheriff." (Thomas depo. at 111:16-23; 123:19 - 125:23). Second, Thomas hired Stan Gregory, an attorney with Bradley, Arant, Rose & White in Montgomery to write new bingo regulations and presented those to the Sheriff, the Macon County Commission, and the Macon County Chamber of Commerce in November 2005. (Thomas depo. at 125:22 - 126:22; 133:9 - 143:8; 150:1-13; 158:23 - 160:14.) Thomas claims that either Segall or Turnham presented the proposed rules to the Sheriff on Thomas's behalf. (Thomas depo. at 150:1-13.) Thomas admitted that he wanted the Sheriff to adopt the rules prepared by Gregory because Thomas knew he did not comply with the existing rules. (Thomas depo. at 145:5-10.) Next, Thomas went to the Sheriff's house, called him on his cell phone, and even mentioned some land that Thomas owned as a potential site for a deputy substation. (Thomas depo. at 127:2 - 128:19.) Finally, Thomas testified that he gave contributions to at least two political action committees during the 2006 primaries which supported a candidate opposing Sheriff Warren because the opposition "made it public that if he were elected that we would get a license and rule changes." (Thomas depo. at 182:12 - 184:16; 185:11-14.)

Thomas claims that he paid Joe Turnham $45,000 to talk to the Sheriff. (Thomas depo. at 252:16 - 253:7.) However, Thomas declined in discovery to produce copies of any checks evidencing payments to Turnham. Thomas also declined to produce in discovery any invoices or copies of checks paid to Stan Gregory for his services. Thomas did produce in discovery a curriculum vitae for Joe Turnham and a "Range of Strategic Consultive Services" proposal pursuant to which Turnham was to be paid $100,000 for consulting and lobbying services.[15] Thomas did not, however, produce any copies of checks paid to Turnham for any services Turnham allegedly rendered.

Plaintiffs alleged in their verified Complaint and Amended Complaint that Sheriff Warren promulgated the 2004 Rules and the 2005 Rules "[w]ithout further justification and for no announced reasons." (Doc. 1, 20 at ¶10, 13.) However, Thomas stated in his deposition that he knew the Sheriff published commentaries for the 2004 Rules and the 2005 Rules. (Thomas depo. at 226:14-227:4.) He acknowledged that the regulations and commentaries were published in the newspaper and that the reasons for the changes were not hidden. (Thomas depo. at 225:4-23; 226:14 - 227.4.) Finally, Thomas understood in 2005 that 38 charities which held Class B Bingo licenses had already designated Victoryland as their qualified operator.(Thomas depo. at 232:14-20.)

Thomas also stated in his deposition that he felt that the Sheriff had effectively denied Reach One's application. (Thomas depo. at 163:12 - 165:10.) Section 14 of the 2003 Rules provides a process for appealing the denial of an application, and neither the 2004 Rules nor the 2005 Rules altered the appeal process. (2003 Rules.) Specifically, the 2003 Rules, and the amendments permit an applicant to appeal the denial of an application to the Macon County Commission and to the Macon County Circuit Court. (2003 Rules.) Thomas knew that the 2003 Bingo Rules gave an applicant the right of appeal for the denial of a license. (Thomas depo. at 163:12 - 165:10.) As of the date of the filing of Plaintiffs' Complaint, neither Thomas, Reach One, nor MCII have appealed the alleged denial to either the Macon County Commission or to the Macon County Circuit

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[15]A copy of Turnham's curriculum vitae and proposal are attached as Exhibit 17.

Court. (Comp. at ¶ 16; Thomas depo. at 165:6-10.)

B. REACH ONE, TEACH ONE OF AMERICA, INC.

The other Plaintiff in this case is an organization named Reach One, Teach One of America, Inc. In 1996, Walter Walker and his wife, Cornelia Walker, formed Reach One. Walker testified in his deposition that the reason they formed Reach One was so he could get free money to help people in the community. (Walker depo. at 45:5-10.) Even though Reach One was incorporated as a 501(c)(3) under the Internal Revenue Code, Reach One has never filed a Form 990 with the Internal Revenue Service. (Walker depo. at 8:23 - 9:12.) Reach One has no assets and no money in its bank account. (Walker depo. at 117:15-20; 130:15-23; 147:22 - 148:1.) For the years 2004, 2005, and 2006, Reach One did not have any expenses. (Walker depo. at 148:2-18.) Reach One does not give receipts to donors. (Walker depo. at 152:2 - 153:10.)

Walker claimed that all of Reach One's corporate documents prior to 2004, such as minutes of meetings, were destroyed when his car caught on fire in August of 2004 and the records were in the car at that time. (Walker depo. at 13:14 - 14:7.) Even though Walker testified that some minutes were destroyed in a car fire in August 2004, Walker also testified that Reach One normally holds its corporate meetings on December 31. (Walker depo. at 99:6-101-13.) Thus, Reach One should have the records for its regular and special meetings since August 2004. Walker testified during his deposition that his wife, who is the Vice-President and Secretary/Treasurer for Reach One, had the minutes for 2004 and 2005 and that he could obtain them and produce them. (Walker depo. at 100:7-100:15.) However, Reach One failed to produce a copy of any minutes.

When asked under oath to give specific examples of Reach One's charitable activities, Walker could not recollect any charitable activities in 2004 or 2005. (Walker depo. at 81:12-18.) Walker did explain a scheme in which he may be using Reach One to avoid taxes. Walker testified that in 1998 and 2001 he personally owned used cars that he donated to individuals. (Walker depo. at 131:1 - 134:10.) Walker would transfer the title to Reach One and then donate the cars to an individual. (Id.) He claims that he and his wife may have donated $10,000 to Reach One that he earned from selling cars in Florida. (Walker depo. at 138:7 - 140:9; 142:6 - 143:19.) Walker would also perform repairs on people's cars from time to time and if the person paid him, he would deposit that money into Reach One's account. (Walker depo. at 138:16 - 139:5; 141:1-10.) Walker uses Reach One to write grant applications for other people and for other nonprofit organizations for which he gets paid. (Walker depo. at 137:16 - 138:6.)

Walker also testified during his deposition that Reach One tapes all of its recipients and that Reach One had photographs of at least some of its activities. (Walker depo. at 70:23-71:1; 84:18-84:22; 85:15-85:20.) Despite Walker's deposition testimony that some earlier records of charitable activities burned in a fire, Walker referenced other videotapes and photographs that apparently were not destroyed, but failed to produce any such videotapes and photographs which evidence of its charitable activities. (Walker Dep. at 72:20-72:23; 84:18-84:22.) Finally, according to Walker's testimony, Reach One may be serving as some type of shelter for at least three other entities: (1) COLORS, which stands for Children of the Lord's Organization Responding Spiritual, and is a "compactor"which his daughter uses to "help the kids and help with tutoring and what they call night lash kids . . . and help out with churches and the old people." (Walker depo. at 111:19-113:6); (2) Jowayayjan Entertainment (Walker depo. at 12:1-13:8); and, (3) Be Ye Holy Ministries which is what Walker calls himself when he travels to other churches to preach (Walker depo. at 87:21-88:13). Based upon the information that Walker gave in his deposition, Reach One's legal and charitable status is rather dubious at best.

The **only** example of **any** charitable activity Walker could recall for 2004, 2005, or 2006 was nothing more than a public relations ploy concocted by Thomas who admitted that "[t]he contribution was made to the schools for PR." (Thomas depo. at 213:22-23.) In March 2006, Thomas personally donated $10,500 to Reach One. (Thomas depo at 207:11-15; Walker depo. at 48:17 - 49:12.) Reach One was then supposed to donate the money to local public schools in Macon County. (Thomas depo. at 208:5 - 209:3; Walker depo. at 49:2-12; 105:18 - 107:2.) When Reach One tried to contribute $6,000 to three public schools in Macon County, the schools refused to accept the money and subsequently returned the checks to Thomas. (Thomas depo. at 209:13 - 211:4; Walker depo. at 105:1- 111:13.) Reach One redeposited the checks into its account and then donated $2,000 to each of four private daycare facilities in Macon County, $2,000 to Reach One, Teach One of Tallahassee (a separately incorporated entity also operated by Walker and his wife), and the Walkers withdrew the remaining $500 in cash.[16] (Walker depo. at 108:17 - 111:13.)

Walker was first contacted about charitable bingo in November or December 2004 when Johnny Ford allegedly called Walker at his home in Tallahassee and told Walker that Tom Debray would be calling about an opportunity. (Walker depo. at 57:19 - 58:8; 61:11 - 62:11; 69:12-18.) Ford asked him to "join forces" with MCII. (Walker depo. at 58:2-4.)

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[16]A copy of the bank statements for Reach One showing the deposit and withdrawal history is attached as Exhibit 18.

Walker then traveled to Macon County from his home in Tallahassee to meet with DeBray. (Walker depo. at 59:19 - 60:2.) In May 2005, after the first meeting with DeBray in late 2004, Walker returned to Macon County to meet with Greg Carr and Frank Thomas. (Walker depo. at 67:1-11; 158:20-23; 162:22 - 163:8.) Thomas paid Walker $500 on three separate occasions as travel expenses for Walker and his wife. (Thomas depo. at 205:3-9.)

During those meetings, Walker never concerned himself with any details concerning bingo or the proposed business deal with Thomas or MCII. (Walker depo. at 66:18 - 67:11.) He also never concerned himself with the bingo rules. (Walker depo. at 160:14 - 161:6.) The only thing Walker recalls discussing with Carr was, "You know, I guess they could use me [as their charity]." (Walker depo. at 161:1.) Reach One signed an agreement with MCII for MCII to operate bingo games for Reach One. (Walker depo. at 187:13-23.) However, Walker is not aware of the terms of the agreement or how much money Reach One is supposed to receive. (Walker depo. at 188:1-17.)

In July 2005 when Reach One submitted its application for a Class B bingo license, Walker knew that the bingo rules required a qualified location in order to obtain a Class B bingo license. (Walker depo. at 194:8-12.) He understood at that time that MCII did not have such a facility. (Walker depo. at 194:13-22.) Walker also admitted that Reach One did not submit evidence of a qualified location, evidence of insurance, or personal data sheets for each of its officers as required by the 2003 Rules and the 2004 and 2005 Rules. (Walker depo. at 194:13 - 197:6.)

ANALYSIS

Sheriff Warren is entitled to summary judgment because no material issue of fact exists and because the Plaintiffs' equal protection claims fail as a matter of law. First, the Plaintiffs' claims fail because they are not justiciable. The Plaintiffs' claims are not justiciable because Plaintiffs have not demonstrated that the claims are redressable such as would confer standing and because the Plaintiffs have not shown that their claims are sufficiently ripe. Second, the Plaintiffs have not demonstrated the existence of the fundamental element of an equal protection claim--that they were treated differently from similarly situated persons without reason. The Plaintiffs were not similarly situated to those organizations granted bingo licenses, and, therefore, any differential treatment was not a violation of equal protection. Finally, as a matter of law, the Plaintiffs cannot prevail because the challenged bingo licensing regulations are rationally related to legitimate police power objectives in protecting the morals and welfare of the community through the regulation of gambling.

I. THE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE BECAUSE THE PLAINTIFFS LACK STANDING AND BECAUSE THEIR CLAIMS LACK RIPENESS.

The Court should grant summary judgment in favor of Sheriff Warren because the Plaintiffs' claims are not justiciable. Justiciability goes to the core of jurisdiction and consists of several related doctrines, including standing and ripeness. See Levy v. Miami-Dade County, 358 F.3d 1303, 1305 (11th Cir. 2004) (explaining that justiciability is a mixture of constitutional and prudential concerns encompassing standing, ripeness, mootness, political questions, and the advisory question prohibition). In the present case, the Plaintiffs lack standing because the Court cannot provide any meaningful redress as the Plaintiffs are not entitled to a Class B Bingo license naming MCII as the operator of the qualified location for Reach One's bingo games under the licensing rules not challenged by the Plaintiffs. See KH Outdoor, L.L.C. v. Clay County, __ F.3d __, 2007 WL 925282, at *4 (11th Cir. Mar. 29, 2007). The Plaintiffs' claims also lack ripeness because the Plaintiffs have not exhausted their administrative remedies under any version of the Macon County Bingo Rules. See National Advertising Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005). Because the Plaintiffs lack standing and because their claims are not ripe, the Plaintiffs have not presented a justiciable controversy. Accordingly, this Court should grant Sheriff Warren's Motion for Summary Judgment.

A. THE COURT SHOULD GRANT SUMMARY JUDGMENT IN SHERIFF WARREN'S FAVOR BECAUSE THE PLAINTIFFS LACK STANDING AS THEIR CLAIMS ARE NOT REDRESSABLE.

The Court should grant Sheriff Warren's Motion for Summary Judgment because the Plaintiffs lack standing given that their claims are not redressable. Standing is rooted in the Constitution's Article III case or controversy requirement and goes to the very subject matter jurisdiction of the federal courts. The burden of establishing standing is on the plaintiff, who must satisfy the following three elements: (1) an injury in fact, (2) which is causally related to the defendant's actions, (3) and which is likely redressable by a favorable judicial decision. See Allen v. Wright, 468 U.S. 737, 751 (1984); KH Outdoor, L.L.C. v. Clay County, __ F.3d __, 2007 WL 925282, at *4 (11th Cir. Mar. 29, 2007); Elend v. Basham, 471 F.3d 1199, 1205 (11th Cir. 2006). In the present case, the Plaintiffs cannot meet their burden of establishing standing because their claims are not redressable. Although Plaintiffs seek to invalidate the 2004 Rules and the 2005 Rules in an effort to obtain a Class B Bingo license permitting Plaintiff Reach One to conduct bingo games at a qualified location operated by Plaintiff MCII, the Plaintiffs are not entitled to a license under the 2003 Rules that they have not challenged. See KH Outdoor, L.L.C., 2007 WL 925282, at *4. Consequently, this Court should grant summary judgment in favor of Sheriff Warren in accordance with the Eleventh Circuit's recent decision in KH Outdoor. See id.

The present case is directly analogous to KH Outdoor, in which the appeals court held that a billboard permit applicant lacked standing to pursue a constitutional challenge to the county's sign ordinance because the applicant was not entitled to a permit under other provisions not challenged. See id. The Eleventh Circuit explained its reasoning in KH Outdoor as follows: "We find that KH Outdoors has not satisfied the redressability requirement. Any injury KH Outdoor actually suffered from the billboard and offsite sign prohibition is not redressable because the applications failed to meet the requirements of other statutes and regulations not challenged." Id. (citing and quoting Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 801 (8th Cir. 2006), and Harp v. Adver. Ill., Inc., v. Village of Chicago Ride, Ill., 9 F.3d 1290, 1292 (7th Cir. 1993)).

The Eleventh Circuit went on to find that the uncontested evidence demonstrated that KH Outdoor's applications were incomplete but, even if the applications had been complete, the applications did not comply with requirements of the building code and state contracting statutes. See id. Thus, the appeals court concluded that the constitutional claims to the sign ordinance were not redressable because a favorable decision would not entitle KH Outdoors to a permit. KH Outdoor, L.L.C. v. Clay County, __ F.3d __, 2007 WL 925282, at *4 (11th Cir. Mar. 29, 2007) ("As a result, a favorable decision, that is, invalidation of the Old Sign Ordinance provisions KH Outdoor challenged, does not mean that KH Outdoor would then receive approval of its sign permit applications, because Clay County could block the proposed signs by enforcing other state statutes and regulations not challenged.").

The Eleventh Circuit's reasoning in KH Outdoor is equally applicable to the present case because a decision in favor of the Plaintiffs would not result in the issuance of a Class B Bingo license as the application submitted to Sheriff Warren fails to meet other licensing requirements not challenged by Plaintiffs. See id. at *5. Plaintiff MCII does not have a facility and cannot meet the minimum capital investment requirement of $5,000,000.00 under the original, 2003 version of the licensing rules. The Plaintiffs have also failed to present any evidence of compliance with the requirements for public liability insurance of at least $5,000,000.00; liquor liability insurance of at least $1,000,000.00, if liquor is to be served; adequate parking for patrons and employees; on premises security as prescribed by the Sheriff; on premises first aid personnel as prescribed by the Sheriff; accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; and satisfactory evidence that the location is fully compliant with the ADA. In addition, Plaintiff Reach One has failed to provide complete information regarding its officers and directors and has never tendered the application fee.

Furthermore, the undisputed evidence tends to show that Plaintiff Reach One is a sham maintained for tax purposes rather than a "bona fide organization" that operates for "charitable, educational, or other lawful purposes" as required under all versions of the Macon County bingo licensing rules. See 2003 Rules at § 1(d); 2004 Rules at § 1(d);2005 Rules at § 1(d). However, as in KH Outdoor, the Plaintiffs do not challenge any of these other requirements, and, as in KH Outdoor, the Plaintiffs' bingo application could be denied for failure to comply with these additional, unchallenged provisions. See KH Outdoor, 2007 WL 925282, at *5 ("Here, a favorable decision for KH Outdoor with respect to the sign code provisions challenged would not allow it to build its proposed signs, because the sign permit applications failed to meet other statutes and regulations that were not challenged."). Consequently, the Plaintiffs' equal protection claims are not redressable and Plaintiffs lack standing. See id.

In summary, the redressability element of standing requires that the claims be susceptible to the granting of meaningful relief in a way that advances the complaining party's ultimate objective. See Scott v. Taylor, 470 F.3d 1014, 1018-19 (11th Cir. 2006). Here, the Plaintiffs' objective is to obtain a Class B bingo license allowing Reach One to conduct bingo games at a qualified location operated by MCII. Their challenge to three of the requirements in the amended licensing rules promulgated by Sheriff Warren is merely the means to that objective. However, even if the Court agreed with the Plaintiffs' contentions concerning the challenged bingo licensing regulations, the Plaintiffs would not be entitled to a license as they have not complied with the requirements of the 2003 Rules, which they have not challenged. See KH Outdoor, 2007 WL 925282, at *4-*5.

B. THE COURT SHOULD GRANT SUMMARY JUDGMENT IN SHERIFF WARREN'S FAVOR BECAUSE THE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Additionally, the Court should grant summary judgment to Sheriff Warren for lack of justiciability because the Plaintiffs failed to pursue available administrative remedies before bringing suit. Like standing, ripeness is a threshold issue going to the federal court's jurisdiction to entertain a matter. See Elend v. Basham, 471 F.3d 1199, 1204-05

(11th Cir. 2006). Ripeness asks whether an actual case or controversy exists and, if so, whether the case or controversy is sufficiently well-defined and advanced to permit judicial inquiry. See id. at 1210-11. A claim is unripe if a plaintiff has failed to pursue and exhaust applicable administrative remedies prior to seeking judicial relief. See id. at 1205 (citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938)). In the present case, the Plaintiffs' claims are unripe because the Plaintiffs did not pursue the administrative remedies available under the Macon County Bingo Rules and Regulations.

"When a court is asked to review decisions of administrative agencies, it is hornbook law that courts must exercise patience and permit the administrative agency the proper time and deference for those agencies to consider the case fully." National Advertising Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005). Here, the Plaintiffs failed to pursue the administrative process established in the 2003 Rules, and carried over in the 2004 and 2005 Rules. Plaintiff MCII's president, Thomas, admitted that he believed that the application had been denied based upon the Sheriff's failure to render a decision on the application. Thomas also admitted that he was aware of the administrative appeal process. The rules expressly provide that application denials may be appealed to the Macon County Commission and the Macon County Circuit Court, but the undisputed evidence shows that the Plaintiffs did not appeal to the commission or the court.

Thus, as in National Advertising, "it is clear that [Plaintiffs] never properly pursued [their] claim through the administrative process that the [Sheriff's bingo regulations] made available to them." National Advertising Co., 402 F.3d at 1339-40. Because the Plaintiffs did not pursue administrative remedies, Plaintiffs cannot demonstrate any hardship as "[i]t would have been far easier, and quicker, for [Plaintiffs] to have exhausted [their] administrative remedies or received a final written denial of its application instead of rushing to the federal courts for relief." Id. at 1341. Consequently, the Plaintiffs' claims are not ripe for failure to exhaust administrative remedies render the matter unfit for judicial review without imposing any hardship on the parties. See id. at 1339.

II. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO SHERIFF WARREN BECAUSE THE PLAINTIFFS CANNOT ESTABLISH THE ELEMENTS OF A VIABLE EQUAL PROTECTION CLAIM.

This Court should grant Sheriff Warren's Motion for Summary Judgment because the undisputed evidence shows that Plaintiffs have not established a prima facie violation of the Fourteenth Amendment's Equal Protection Clause. The Eleventh Circuit recognizes the following three distinct types of equal protection claims: (1) that a statute or regulation is facially discriminatory; (2) that neutral application of a neutral statute or regulation has a disparate impact; and, (3) that a neutral statute or regulation has been applied in an unequal manner to similarly situated persons. See E&T Realty v. Strickland, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987); Jackson v. City of Auburn, 41 F. Supp. 2d 1300, 1308 (M.D. Ala. 1999). The Plaintiffs, though, have failed to establish a prima facie case for any recognized type of equal protection claim.

The Plaintiffs' allegations and the undisputed, material facts do not support any of the three equal protection claims recognized by the Eleventh Circuit. The Plaintiffs make no allegation that Sheriff Warren's neutral application of the Macon County Bingo Licensing Rules and Regulations has resulted in a disparate impact. Instead, although Plaintiffs have not specified the type of equal protection claims that they have alleged, the Plaintiffs claims appear to fall within either the first or third category of equal protection claims recognized by the Eleventh Circuit. However, Plaintiffs have not presented any evidence supporting either the first or third type of equal protection claim.

As a matter of law, the Plaintiffs cannot satisfy the elements for either the first or third category of equal protection claims recognized by the Eleventh Circuit. First, the Plaintiffs have not presented a viable claim that the bingo licensing rules are discriminatory on their face because the Plaintiffs have failed to meet their burden of negating every possible rational basis for the challenged rules. See Lofton v. Secretary of Dep't of Children and Family Servs., 358 F.3d 804, 818 (11th Cir. 2004). Additionally, the Plaintiffs have not presented a viable claim that the bingo licensing rules have been applied unequally because the Plaintiffs have failed to show that they were treated differently from any similarly situated persons or that Sheriff Warren intended to discriminate against Plaintiffs. See Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006). Consequently, the Court should find in favor of Sheriff Warren on all of the Plaintiffs' equal protection claims and grant the Sheriff summary judgment.

A. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO SHERIFF WARREN BECAUSE THE CHALLENGED REGULATIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT OBJECTIVES.

The Court should grant summary judgment in favor of Sheriff Warren because the Plaintiffs have failed to produce any evidence that the three challenged bingo rules are not rationally related to a legitimate government objective. See Georgia Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1321-22 (11th Cir. 2003) (affirming summary judgment in favor of defendant because rational basis existed for state law and regulations). Plaintiffs' claims do not involve any fundamental rights or suspect classes; but involve common social and economic regulation; therefore, the rational basis test is the proper standard for review.

See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). In promulgating the 2004 and 2004 amended bingo rules, Sheriff Warren issued commentaries explaining that the amendments were made to further the legitimate governmental objectives of regulating gambling, promoting economic development, and providing for the public welfare. Other rational bases, such as the suppression of fraud, may also be conceived for the amended bingo rules. Consequently, the Plaintiffs have failed to show the absence of any conceivable legitimate basis for the amendments and cannot prevail on their equal protection claims as a matter of law. See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993); Panama City Med. Diagnostics Ltd. v. Williams, 13 F.3d 1541, 1545-46 (11th Cir. 1994). Thus, summary judgment in favor of Sheriff Warren is warranted.

1. The Rational Basis Test Applies to Plaintiffs' Equal Protection Claims Because the Plaintiffs do not Belong to a Suspect Class and the Plaintiffs' Claims do not Implicate a Fundamental Right.

Social and economic regulations that do not classify persons on the basis of a suspect factor and that do not infringe upon a fundamental right are evaluated using the rational basis test. See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Alamo Rent-A-Car, inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 370 (11th Cir. 1987). In Dukes, the Supreme Court explained that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be rationally related to a legitimate state interest." Dukes, 427 U.S. at 303.

See also Alamo, 825 F.2d at 370. All that is required is to survive rational basis review is that some conceivable, rational basis could exist for the law or regulation. See Beach Communications, 508 U.S. at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

In the present matter, because neither Plaintiff has advanced any claim warranting heightened scrutiny, the rational basis test applies to the analysis of their claims. Plaintiffs Reach One and MCII do not assert that they belong to any protected class. See Alamo Rent-A-Car, inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 370 (11th Cir. 1987). The Plaintiffs do not claim that Sheriff Warren and the bingo licensing regulations have infringed on any fundamental right. See Gregory v. Ashcroft, 501 U.S. 452, 470 (1991). The only possible "right" that Plaintiffs have asserted is to a license for the operation of a bingo games, but no constitutional right exists to operate bingo games or, generally, to gamble or to operate a gambling business. See United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) (observing that gambling "implicates no constitutionally protected right"); Lewis v. United States, 348 U.S. 419, 423 (1955) (stating that "there is no constitutional right to gamble"); Marvin v. Trout, 199 U.S. 212 (1905) (finding that no constitutional right exists to operate a gambling enterprise); St. John's Melkite Catholic Church v. Commissioner or Revenue, 242 S.E.2d 108 (Ga. 1978) (holding that state constitutional bingo amendment did not create fundamental right). States may ban gambling outright, but if a state decides to allow some form of gambling, it may regulate that activity strictly. See, e.g., United States v. Edge Broadcasting Co., 509 U.S. 418, (1993) (stating that gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether"); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 346-47 (1986) (explaining that the power to ban an activity considered a vice necessarily includes the power to regulate that activity).

To summarize, the amended rules challenged by the Plaintiffs do not implicate any factor requiring heightened scrutiny. Instead, the bingo licensing regulations promulgated by Sheriff Warren are classic examples of social and economic regulation undertaken to regulate a form of gambling (charitable bingo) in furtherance of the state's inherent police powers. See Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 399 F. 3d 1276, 1278 (11th Cir. 2005) (recognizing that regulation of gambling falls within the police powers); Ocala Kennel Club, Inc. v. Rosenburg, 725 F. Supp. 1205, 1207-1208 (M.D. Fla. 1989) (recognizing power to regulate gaming, including limiting number of licenses and locations). Consequently, the proper standard of review for the bingo licensing regulations challenged by Plaintiffs Reach One and MCII is the rational basis test. See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313-16 (1993); Gregory, 501 U.S. at 470-71.

2. The Macon County Bingo Rules and Regulations are Rationally Related to Legitimate Governmental Interests.

The Plaintiffs cannot prevail on their equal protection claim because the Macon County bingo rules are rationally related to legitimate government interests and satisfy the rational basis test. The rational basis test is not demanding. See Panama City Med. Diagnostics Ltd. v. Williams, 13 F.3d 1541, 1545-46 (11th Cir. 1994); Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239, 1241 (11th Cir. 1991). Rational basis review does not require the classification or law to be perfect to satisfy equal protection. See Anderson v. Winter, 631 F.2d 1238, 1240 (5th Cir. 1980) ("Nevertheless, a state's regulation of social and economic matters does not violate this principle 'merely because the classification made by its laws are imperfect.'") (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)). Under the Fourteenth Amendment, considerable discretion is vested in the states to make classifications, and courts presume these classifications or distinctions to be constitutional under traditional equal protection standards. See Melton v. Gunter, 773 F.2d 1548, 1551 (11th Cir. 1985). A regulation or classification will be struck down under the rational basis test only if completely unrelated to a legitimate state objective and only if no possible reason for the rule of law can be conceived. See id. See also Cash Inn, 938 F.2d at 1241.

The burden is on the plaintiff to negate every possible basis for the challenged provision. See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993). Furthermore, the government need not have articulated its purpose for enacting the law or promulgating the regulation at issue. See id. at 315; Bah v. City of Atlanta, 103 F.3d 964, 967 (11th Cir. 1997) (citing Heller v. Doe by Doe, 509 U.S. 312, 320 (1993)). In the words of the Supreme Court, "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." Nordlinger v. Hahn, 505 U.S. 1, 15 (1992). Even if the government stated its reasons for enacting the law, as Sheriff Warren did in the commentaries accompanying both the 2004 and 2005 amendments to the bingo rules, the analysis of its rationality under the Equal Protection Clause is not limited to those stated rationales. See Alamo Rent-A-Car, inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 371 n.4 (11th Cir. 1987). The court hearing an equal protections challenge, therefore, may properly consider reasons not weighed by the original decisionmaker. See Panama City Med. Diagnostics Ltd. v. Williams, 13 F.3d 1541, 1546 (11th Cir. 1994) ("Therefore, in evaluating the rational basis for a statute, it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage."). See also Georgia Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1321-22 (11th Cir. 2003).

Furthermore, the law need not actually advance its stated purposes. See Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 371 n.4 (11th Cir. 1987). The Supreme Court has explained that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reasons for the challenged distinction actually motivated the legislature." Beach Communications, 508 U.S. at 315. So long as a rational decision-maker could have thought that the law or regulation could advance some legitimate government interest, it will be sustained. See Alamo, 825 F.2d at 372.

In the present case, the Plaintiffs have failed to satisfy their burden of negating every conceivable basis for the challenged bingo rules much less the reasons stated in the commentaries issued by Sheriff Warren upon the adoption of the disputed amendments. See Beach Communications, Inc., 508 U.S. at 314-15. The Plaintiffs have challenged three provisions found in the amended bingo licensing rules promulgated in 2004 and 2005. First, the Plaintiffs challenge the 2004 amendment which raised the value required for a facility to be a qualified location for the conduct of bingo by a Class B Bingo licensee from $5,000,000.00 to $15,000,000.00. Second, the Plaintiffs challenge the 2004 amendment requiring that before a facility can be approved as a qualified location, a minimum of fifteen Class B Bingo licenses must be issued for that location. Finally, the Plaintiffs have challenged the 2005 amendment limiting the maximum number of Class B Bingo licenses to 60.[17] Notwithstanding the Plaintiffs' arguments, rational bases exist for all three challenged amendments.

a. The Provision Requiring a Capital Investment of $15 Million for a Qualified Location is Rationally Related to Legitimate Governmental Interests in Regulating Gaming and Promoting Economic Development and Stability.

The Plaintiffs' challenge to the 2004 amendment which raised the minimum capital investment for a "qualified location" from $5,000,000.00 to $15,000,000.00 fails because the amendment is rationally related to a legitimate government interest, economic development. In promulgating the 2004 amendments to the bingo licensing regulations, Sheriff Warren also issued a commentary explaining the changes and the reasons for the changes. The commentary explained that "the capital investment amount required for a 'qualified location' for the holder of a Class B Bingo license is hereby increased to $15,000,000.00 and limited to actual cost in order to require any qualified location to provide a significant investment and financial commitment to Macon County prior to becoming a 'qualified location.'" See Commentary to 2004 Rules at § 1(i). The stated rationale--economic development--is a legitimate state interest. See Kelo v. City of New London, 545 U.S. 469, 484 (2005) ("Promoting economic development is a traditional and long accepted function of government."). Thus, the regulation passes the rational basis test because it is rationally related to the accomplishment of this governmental objective.

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[17] Plaintiffs have not raised any objections to any of the other five amendments made in 2004 or the other two amendments made in 2005 and that Plaintiffs **have not challenged** that original 2003 Rules which required an existing facility valued at $5 million.

Of course, a regulation may have more than one purpose. See Gregory v. Ashcroft, 501 U.S. 452, 471 (1991) (discussing possible reasons for enactment of state constitutional provision under review). See also Alamo Rent-a-Car, Inc. v. Sarasota Manatee Airport Auth., 825 F. 2d 367,371 (11th Cir. 1987). Furthermore, as noted, the government is not required to state a reason for enacting a law or promulgating a regulation. See Alamo, 825 F. 2d at 371 n.4. Even when the government has stated the reasons for its actions, a court addressing an equal protection challenge is not limited to considering those stated purposes, and the government may advance additional, legitimate interests which a rational decisionmaker could have believed that the law or regulation would serve. See id.

Here, a rational decision maker also could have found that raising the minimum capital investment requirement for a qualified location to $15,000,000.00 would advance the state's interest in the regulation of gambling. The regulation of gambling is a legitimate governmental interest rooted in the state's police power to protect the public health, safety, welfare, and morals. See Jones v. State, 321 So. 2d 247 (Ala. Crim. App. 1975) (holding that the control of gambling comes within the police powers). In the words of the Eleventh Circuit, "[t]he regulation of gambling lies at the 'heart of the state's police power.'" Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 399 F. 3d 1276, 1278 (11th Cir. 2005) (quoting Johnson v. Collins Entertainment Co., Inc., 199 F. 3d 710, 720 (4th Cir. 1999)).

A rational decisionmaker could have believed that a higher capital investment requirement for qualified locations would help protect the integrity of the Class B bingo games by discouraging inexperienced or poorly funded or unscrupulous facility operators from attempting to locate in Macon County. Increasing the minimum capital investment requirement would certainly tend to dissuading illegitimate, criminal, or simply inexperienced or naive operators from opening facilities. A rational decisionmaker could also have concluded that discouraging undesirable facilities operators would protect both the bingo-playing public and the Class B Bingo license holding charities from fraud--another legitimate governmental interest. See Allendale Leasing, Inc. v. Stone, 614 F.Supp. 1440, 1457 (D.R.I. 1985) (upholding bingo regulations against equal protection challenge because regulations were rationally related to state's interest under police powers in preventing fraud); State v. Kartus, 162 So. 533, 534 (Ala. 1935) (noting that the prevention of fraud and deceit are within the state's police powers). See also Georgia Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1321-22 (11th Cir. 2003) (finding protection of consumers from fraud to be a rational basis).

Finally, as a result of competition in the gaming business, a Macon County facility would necessarily be required to compete with lotteries in Georgia, Florida and Tennessee, Native American bingo gaming facilities in Wetumpka and Atmore, Alabama, and Mississippi casinos in Biloxi, Gulfport and Philadelphia. Because of the tremendous size of the prizes awarded to patrons of the state-sponsored lotteries, the bingo facilities and the Gulf Coast casinos, a Macon County gaming facility would have to be large enough to compete and attract customers away from existing gaming establishments – to offer enough bingo games, amenities and perhaps other gaming opportunities such as parimutuel wagering on live greyhound racing and simulcast horse and greyhound races across the country. Also, the size of the capital requirement necessarily operates to limit the number of gaming establishments subject to regulation.

b. The Provision Requiring a Minimum of 15 Class B Bingo License Holders Before an Operator Can Serve as a Qualified Location is Rationally Related to the Legitimate Government Interests of Regulating Gaming and Preventing a Charity From Serving as a Front for a Sham Gambling Operation.

The Plaintiffs' challenge to the requirement that a minimum of fifteen Class B Bingo licensees request to conduct bingo at a particular facility before that facility can be approved as a "qualified location" must also fail because the requirement is rationally related to the government's interests in protecting the integrity of bingo operations. Protecting the integrity of legalized, charitable bingo in Macon County was the stated purpose behind the 2004 amendment requiring a minimum of fifteen Class B Bingo licenses for a particular location before it could be approved as a qualified location. The commentary to the 2004 Rules explained that the fifteen license minimum was designed, in part, "to further avoid the potential abuse of a third party individual or business entity from using one nonprofit organization (or a minimum number) as a 'front' to operate bingo games under a Class B license . . . ." Commentary to 2004 Rules at § 2. The fifteen license minimum was also intended to "maximize economic benefits to numerous nonprofit organizations" and having the minimum provides assurance "that a large representative group of charities is afforded the opportunity to obtain the economic benefits associated with a Class B License." Id.

Again, the regulation of gambling is a legitimate state interest under the police power. See Gulfstream Park, 399 F. 3d at 1278. Because Sheriff Warren could rationally have believed that the fifteen license minimum could advance the goal of preventing abuse of charitable bingo by third-party facility owners and to spread the benefits among a representative group of nonprofit organizations, the Plaintiffs cannot meet their burden of showing the absence of a rational basis for the amended regulation. See Alamo Rent-a-Car, Inc. v. Sarasota Manatee Airport Auth., 825 F. 2d 367, 371-72 (11th Cir. 1987).

The 2004 amendment requiring a minimum of fifteen Class B Bingo licenses for a particular location before it could serve as a qualified location sought to prevent exactly what Plaintiffs Reach One and MCII attempted to accomplish in 2005 when Reach One applied for a Class B Bingo license and proposed MCII as the operator and qualified location. Fully aware of the 15 charity minimum, Thomas began soliciting charities in the spring of 2005. Thomas contracted with James Lane to find 15 charities in exchange for $250,000.00, an amount which Thomas paid Lane despite Lane's finding only one charity. Next, Thomas hired Tom DeBray to assist him in locating suitable charities. DeBray obtained a "black book of charities" from Johnny Ford. MCII's Carr then picked Reach One from the "black book." MCII promised to pay $15,500 to Reach One if Reach One obtained a Class B Bingo license with MCII as the operator of the qualified location. Although Reach One signed an agreement with MCII for MCII to operate bingo games on Reach One's behalf, Reach One's Walker admits that he did not know the terms of the agreement or the amount of money that Reach One would receive under the operating agreement. Walker admitted that he was just helping MCII make money. (Walker depo. at 192:5-13.) The evidence, therefore, shows that MCII intended to use Reach One as a front to operate bingo games in Macon County, which is what the Sheriff's amended regulation was designed to prevent.

c. The Provision Requiring a Maximum of 60 Charities to Operate Class B Bingo in Macon County is Rationally Related To Legitimate Governmental Interests in Limiting Gaming and Preventing the Harmful Effects from Wide-Spread Gambling Operations.

Finally, Plaintiffs have challenged the 2005 amendment that limited the total number of Class B Licences to sixty, but the sixty license maximum is rationally related to the legitimate government goals of regulating gambling.[18] See Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 399 F. 3d 1276, 1278 (11th Cir. 2005). Sheriff Warren also issued a commentary to the 2005 Rules to the bingo licensing regulations in which he explained the rationale for the sixty license maximum. The commentary explains as follows:

> A new sentence has been added to the end of Section 2 to limit the number of Class B Licenses that may be issued in order to follow the policy of the Attorney General to limit Class B bingo gaming activities in Macon County, Alabama, and to allow the Sheriff to more effectively regulate and enforce the proper conduct of such bingo games.

Commentary to 2005 Rules at § 2. The commentary could not be clearer that the purpose of the amendment was to regulate gambling, a legitimate use of the police powers. See Gulfstream Park, 399 F. 3d at 1278.

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[18] The Plaintiffs also seem to suggest that the sixty license maximum together with the requirement that a minimum of fifteen nonprofit organizations must request a license for a particular proposed "qualified location" before that qualified location can be approved creates some impermissible restriction on competition, but the law does not support this proposition. State regulation does not offend equal protection even if it results in a monopoly so long as the underlying regulation is rationally related to a legitimate governmental interest. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (rejecting equal protection challenge of city ordinance limiting number of available permits, despite argument that scheme created monopoly for favored class, because ordinance was rationally related to government interest); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 184 (holding that "the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying the equal protection of the law"). See also Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) (rejecting equal protection claim that casino gaming law gave Indian tribes monopoly on casino gambling because law was rationally related to state's interests in regulating gambling).

Limiting the number of licenses also lessens the demand for Class B bingo by limiting the number of available venues. The Unites States Supreme Court has upheld regulations designed to lessen demand for or access to otherwise legal gambling as a legitimate exercise of the government's police power to regulate potentially harmful activities for the protection of the public. See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-47 (1986) (upholding regulations limiting advertising of casino gambling to residents as opposed to tourists to prevent harmful effects of gambling on residents). The Fourth Circuit has explained the connection between the state's police power and the regulation of gambling as follows:

> The regulation of gambling lies at the heart of the state's police power. Formulations of that power underscore the state's paramount interest in the health, welfare, safety, and morals of its citizens. The regulation of lotteries, betting, poker, and other games of chance touch all of the above aspects of the quality of life of state citizens.

Johnson v. Collins Entertainment Co., Inc., 199 F.3d 710, 720 (4th Cir. 1999) (citations omitted). Because bingo is a form of gambling, a state's police power encompasses the regulation of bingo. See C.I.R. v. Groetzinger, 480 U.S. 23, 29 n.11 (1987).

Alabama prohibits bingo except where permitted by an amendment to the Alabama Constitution. The amendment to the Alabama Constitution legalizing bingo in Macon County is an integral part of this exception to the extensive prohibition on gambling in the State of Alabama and directs the Sheriff to "promulgate rules and regulations for the licensing and operation of bingo games within the county." Ala. Const. amend. 744. Other jurisdictions have held that the government, when it chooses to legalize gambling, can restrict the number of gaming or amusement facilities in a locality. See, e.g., Primm v. City of Reno, 252 P.2d 835, 838 (Nev. 1953) ("Municipalities have the power, under appropriate charter provisions, to regulate the business of gambling as conducted within their geographical limits, and they may suppress it entirely or may limit the number of establishments engaging in such business by the withholding or granting of licenses, and as long as the action taken is not discriminatory or arbitrary, municipality need not depend, for validity of its regulations, upon the formal adoption of some uniform rule of action by ordinance or otherwise, regardless of whether a general licensing ordinance exists."); Rodriguez v. Jones, 64 So. 2d 278, 279 (Fla. 1953) ("In regulation of authorized gambling establishments, it is public policy of state to limit distance within which additional establishments of like character may be licensed for operation."); Landers v. Eastern Racing Ass'n, 97 N.E.2d 385, 394 (Mass. 1951) ("The second contention of the plaintiff is disposed of by what was early said in Decie v. Brown, 171 Mass. 290, at page 291, 45 N.E. 765, 766, 'The limitation of the number of licensed places within the territory of a town or city is a reasonable exercise of the police power, and therefore is not in conflict with the constitution of the commonwealth.'").

Indeed, the very power to regulate gaming necessarily implies the power to limit the number of gaming licenses. See State ex rel. Grimes v. Board of Comm'rs of Las Vegas, 1 P.2d 570, 572 (Nev. 1931). Accordingly, the limitation of the number of licensed facilities operating bingo games in Macon County is a reasonable exercise of the police power.[19]

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[19] Sheriff Warren's setting of a maximum number of Class B licences for bingo is also analogous to the setting of a maximum number of liquor licenses, which frequently has been upheld as a legitimate exercise of the state's police power to regulate for the public health, safety, and welfare. See, e.g., Bradshaw v. Dayton, 514 S.E.2d 831, 832-33 (Ga.

Because the Sheriff was acting as a rational decisionmaker in finding that capping the number of licenses could promote the regulation of gambling and prevent the harmful effects from wide-spread gambling operations, the 2005 amendment satisfies equal protection.

Other methods of effectively but indirectly limiting the number of licensees or locations of gaming facilities and devices also have been held to satisfy due process because of the state's inherent interest in regulating gambling. See, e.g., Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003); Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003); Watt v. Firestone, 491 So. 2d 592 (Fla. Dist. Ct. App. 1986). For example, the Ninth circuit upheld a state law that limited casino gambling to Indian tribal land against an equal protection process because the limitation served the state's interest in regulating the growth of gambling. See Artichoke Joe's, 353 F.3d at 740. The Ninth Circuit found further that in "restricting large-scale gambling enterprises to carefully limited locations, California furthers its purpose of ensuring that such gaming activities 'are free from criminal and other undesirable elements'." Id. (citations omitted). Similarly, the Fourth Circuit rejected an equal protection challenge to a North Carolina law that sought to limit the number of video gaming machines in the state by making illegal all machines not listed on the tax rolls and in operation by specific dates. See Helton, 330 F.3d at 246. The court

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1999); Division of Beverage v. Dav-Ed, Inc., 324 So.2d 682, 683-84 (Fla. Dist. Ct. App. 1975); Henson v. Department of Law Enforcement, 684 P.2d 996, 999 (Idaho 1984); Costco Wholesale Corp. v. City of Livonia, 2006 WL 2632314, at *5 (Mich. Ct. App. Sept. 14, 2006); Jordan v. City of Centerville, 119 S.W.3d 214, 216-17 (Mo. Ct. App. 2003); Colvin v. Department of Revenue, 661 P.2d 462, 463 (Mont. 1983); State ex rel. Amvets Post 27 v. Beer Bd., 717 S.W.2d 878, 881 (Tenn. 1986); Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338,1339 (Utah 1980).

held that "North Carolina has a legitimate interest in restricting the number of new gaming machines in the state as a means of limiting the impact of gambling on the lives of its citizens . . . ." Id. In fact, the Florida courts have found that limiting the number of casinos in itself is a sufficient rational basis for upholding an equal protection challenge to a law that limited casinos to hotels with at least 500 rooms. See Watt v. Firestone, 491 So. 2d 592, 594 n.4 (Fla. Dist. Ct. App. 1986) (holding that proposed constitutional amendment which limited operation of casinos to hotels having 500 or more sleeping units withstood equal protection challenge because the size requirement limited number of such establishments, necessarily required casinos to be located in tourist-oriented areas and assured professional management).

In addition to advancing the state's interest in regulating gambling, limiting the number of available Class B Bingo licenses advances the government's legitimate interest in promoting and protecting the economic viability of charitable bingo in Macon County. See Ocala Kennel Club, Inc. v. Rosenburg, 725 F. Supp. 1205, 1208-1209 (M.D. Fla. 1989). In Ocala Kennel Club, the court rejected an equal protection challenge to a Florida law prohibiting the issuance of a permit for a greyhound racing facility within a one hundred mile radius of an existing facility, which effectively precluded the issuance of permit to the plaintiff. See id. at 1206-08. Although the plaintiff presented evidence challenging the efficacy of the regulation in achieving the proffered purpose (i.e., protecting the economic viability of the racing industry), the court concluded that the limitation was rationally related to the state's legitimate interest. See id.

Similarly, here, directly limiting the number of licenses (which the Florida law at issue in Ocala Kennel Club did indirectly) serves to promote the economic viability and stability of charitable bingo. A rational decisionmaker could have believed that this, in turn, would serve to stabilize the economic benefit to Macon County derived from charitable bingo. Cf. id. Thus, the sixty license limit is rationally related not just to the stated legitimate government interest in regulating gambling but is also rationally related to the legitimate government interests in protecting the viability of charitable bingo and its resulting economic benefit to the people and government of Macon County.

The Plaintiffs do not appear to object to the concept of restricting the number of licenses, but to the precise number of Class B Bingo licenses allowed. However, precedent does not support the Plaintiffs' argument that setting the maximum number of licenses at sixty rather than some other number violates equal protection. Equal protection does not require any mathematical precision in promulgating regulations. Likewise, equal protection does not demand that the decision-maker's choice be supported by data or studies. See Doe v. Moore, 410 F.3d 1337, 1346 (11th Cir. 2005) ("In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). All that equal protection requires is that a rational decision-maker could have concluded that the law or regulation in question could advance some legitimate governmental interest. The judgment or ultimate wisdom of that decision is not an issue for judicial inquiry. See Anderson v. Winter, 631 F.2d 1238, 1240 (5th Cir. 1980).

To summarize, in the present case, the 2004 and 2005 Rules to the bingo licensing regulations do not violate Plaintiffs' equal protection rights because the undisputed evidence shows that the regulations are rationally related to the government's interests in economic development, regulating gambling, preventing fraud, and protecting the viability of charitable bingo.

B. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO SHERIFF WARREN BECAUSE THE PLAINTIFFS HAVE NOT SHOWN THAT THEY HAVE BEEN TREATED DIFFERENTLY FROM ANY SIMILARLY SITUATED PERSONS.

Finally, the Plaintiffs' equal protection claim must also fail as a matter of law because the Plaintiffs cannot show any intentional, unequal treatment in comparison to any similarly situated persons. The equal protection clause of the Fourteenth Amendment does not protect against all unequal treatment; its protections are limited to prohibiting intentionally discriminatory treatment of similarly situated persons. See Campbell v. Rainbow City, 434 F.3d 1306, 1313-14 (11th Cir. 2006); Rowe v. City of Cocoa, 358 F.3d 800, 803 (11th Cir. 2004); E&T Realty v. Strickland, 830 F.2d 1107, 1111-14 (11th Cir. 1987); James v. Tallassee High Sch., 907 F. Supp. 364, 367 (M.D. Ala. 1995). Here, in addition to challenging the requirements of the bingo licensing regulations requiring that a qualified location for a Class B Bingo license must have a value of $15,000,000.00, requiring that fifteen charities must apply for a license for an individual qualified location before that location can be approved, and limiting the number of Class B Bingo licenses to a total of sixty, the Plaintiffs challenge the application of these regulations to Reach One's July 2005 application for a Class B Bingo license. However, the Plaintiffs admittedly submitted an application that was deficient on a number of grounds and Plaintiffs have failed to raise any genuine issue of material fact suggesting the existence of any comparator that was treated differently or the existence of any discriminatory intent. See Campbell, 434 F.3d at 1313-14. Consequently, Sheriff Warren is entitled to summary judgment on the Plaintiffs' equal protection claims.

In a traditional equal protection claim based on differing application of the law, plaintiffs must establish two basic elements. The Eleventh Circuit recently explained that, in such cases, "Plaintiffs must show (1) that they were treated differently from other similarly situated individuals, and (2) that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiffs." Id. See also Powell v. City of Montgomery, 56 F. Supp. 2d 1328, 1332-33 (M.D. Ala. 1999) (finding that Plaintiff failed to show similarly situated person treated differently and failed to show unequal application of regulation with intent to discriminating against Plaintiff). Plaintiffs Reach One and MCII, though, have offered no evidence supporting either necessary element of their equal protection claim that they were treated differently in the application of the Class B bingo licensing regulation in violation of the Fourteenth Amendment.

As part of the first element of an unequal treatment claim, a Plaintiff must identify a similarly situated comparator and the showing "requires some specificity." Campbell, 434 F.3d at 1314. In other words, a Plaintiff must show that the existence of another person who was treated differently despite being "identical in all relevant respects" to the Plaintiff. Id. See also Jackson v. City of Auburn, 41 F. Supp. 2d 1300, 1309 (M.D. Ala. 1999) (finding that purported comparators were "not similarly situated because the type and level of noncompliance distinguishes the individuals who submitted these applications from the plaintiffs"). However, neither Plaintiff Reach One nor Plaintiff MCII has identified any specific comparator that is similarly situated to either Plaintiff.

1. Plaintiffs Have Failed to Identify a Similarly Situated Person Treated in a Different Manner.

Plaintiff Reach One applied as a nonprofit organization for a Class B Bingo license to conduct bingo games at a nonexistent "qualified location" to be operated by Plaintiff MCII. However, Plaintiff Reach One's application package was deficient even under the 2003 Rules, which Plaintiffs do not challenge. Plaintiff Reach One's application lacked the following: (1) public liability insurance of at least $5,000,000.00; (2) if liquor is served, liquor liability insurance of at least $1,000,000.00; (3) adequate parking for patrons and employees; (4) onsite security as prescribed by the Sheriff; (5) onsite first aid personnel as prescribed by the Sheriff; (6) accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; (7) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements comprising said location; (8) satisfactory evidence that the location is fully compliant with the ADA; (9) complete information regarding the officers and directors of Reach One; and (10) a tender of the bingo license fee.[20]

2. Plaintiffs Are Not Similarly Situated to the Only Current Qualified Location Because Plaintiffs Cannot Meet Even the 2003 Licensing Requirements.

Moreover, Reach One has not identified any similarly situated nonprofit organization that applied for and was granted a Class B Bingo license based on an application listing an as-yet-to be-built "qualified location" to be operated by a company with no assets and no experience managing a gaming operation. Cf. Powell, 56 F. Supp. 2d at 1333 (describing characteristics of person similarly situated to plaintiffs); Jackson, 41

[20]Indeed, Plaintiffs even conceded in their Responses to Request for Admissions that they failed to comply with 8 out of 10 of these requirements. A copy of the Responses is attached hereto as Exhibit 19.

F. Supp. 2d at 1308 (same). In fact, Reach One has not identified any nonprofit group that it alleges was treated in a dissimilar manner. Because Plaintiff Reach One has not presented any evidence of a similarly situated person who was treated dissimilarly, Plaintiff Reach One has not presented a viable claim for violation of its equal protection rights. See Strickland v. Alderman, 74 F.3d 260, 265 (11th Cir. 1996).

Although Plaintiff MCII has identified one alleged comparator (the operator of an approved qualified location for Class B Bingo licensees), the undisputed material facts show that the supposed comparator is not similarly situated. Plaintiff MCII has alleged that Macon County Greyhound Park (known as "Victoryland") was treated differently, but Victoryland is not similarly situated to Plaintiffs in any relevant respect. The Plaintiffs' main complaint appears to be that Victoryland was initially approved as a qualified location in 2003 under the original bingo licensing regulations, but that fact actually points to how Victoryland and the Plaintiffs are differently situated. See E&T Realty v. Strickland, 830 F.2d 1107, 1111-14 (11th Cir. 1987); Sandbach v. City of Valdosta, 526 F.2d 1259, 1260-61 (5th Cir. 1976).

Persons issued licenses under different versions of a law or under different circumstances are not similarly situated to those denied a license under the current version of the law for purposes of equal protection. See Sandbach, 526 F.2d at 1260-61. For example, in Sandbach, the former Fifth Circuit held that the plaintiff, who was denied a liquor license under a recently amended city ordinance because his establishment was within 200 feet of a church, was not similarly situated either to a license holder who was allowed to retain his license under a grandfather clause after a church was built near his establishment or to individuals issued liquor licenses under a repealed prior amendment that had temporarily removed all distance restrictions on liquor licenses. See id. Furthermore, as explained by the Eleventh Circuit, the "government does not violate the equal protection clause by granting a permit to an applicant who has a nonfrivolous claim of entitlement under the pertinent legislation and by denying a permit to another applicant who is clearly unentitled to it: the two applicants are not similarly situated." E&T Realty, 830 F.2d at 1111. Thus, in the E&T Realty case, the Eleventh Circuit found that "[o]nly if both [comparator] and [plaintiff] were clearly unentitled to approval of their application would they be similarly situated." Id. at 112. In the present matter, the undisputed evidence shows that Plaintiff MCII clearly was not entitled to approval of a qualified location for the operation of bingo under a Class B Bingo license whereas Victoryland clearly was entitled to approval as a qualified location. (Warren Aff. at ¶ 11, 25, Exhibits A, D thereto.)

Setting aside the three regulations challenged by the Plaintiffs, Plaintiff MCII was not entitled to approval as a qualified location for bingo because MCII met none of the other requirements, even under the original 2003 regulations. The undisputed facts reveal that MCII does not have any facility in which to operate bingo games nor does MCII have any assets with which to purchase or construct a suitable facility. MCII does not have nor did it ever have in place any financing with which to buy or build a facility. Indeed, MCII does not have a bank account in which to deposit any funds. Furthermore, the land on which MCII planned to locate the facility is not owned by MCII but by Thomas, who purchased the property and an additional 308 acres for a total of $1,130,000.00. These facts make it impossible for MCII to have complied with the requirements to obtain approval as a qualified location to host bingo games for Class B Bingo licensees because the 2003 regulations required an existing facility meeting specific standards.

The definition of a "qualified location" and other provisions in the original 2003 bingo licensing regulations necessarily required an existing facility. Under the 2003 regulations, a "qualified location" was defined as follows:

> "Qualified location" for the holder of a Class B Bingo License shall mean a location, as defined above, which has been inspected and approved by the Sheriff for the conduct of bingo games and other lawful activities for which the license applicant shall submit . . . (viii) satisfactory evidence that the owner or owners of the location paid at least $5,000,000 for the land, building and other capital improvements (before depreciation) comprising said location or the value of said land, building and other capital improvements (before depreciation) must be at least $5,000,000 . . . .

2003 Rules at § 1(j). However, the undisputed evidence demonstrates that neither MCII nor Reach One has any facility for conducting bingo operations, much less a facility valued at $5,000,000.00 or more. In contrast, Victoryland possesses a facility valued at more than $15,000,000.00, which satisfies the original licensing rules as well as the 2004 and 2005 amended licensing regulations. (Warren Aff. at Exhibits A,D.) Consequently, Victoryland is not a valid comparator, and the Plaintiffs have failed to show that a similarly situated person was treated in a different manner.

3. Plaintiffs Have Failed to Show Any Intent to Discriminate.

In addition to failing to produce evidence of any differential treatment, Plaintiffs have failed to show any intent to discriminate against the Plaintiffs. See E&T Realty, 830 F.2d at 1113-14. Although the Plaintiffs have alleged that Sheriff Warren's actions were "arbitrary and capricious," such allegations are insufficient to establish intentional discrimination in support of an equal protection violation (Amend. Compl. ¶ 25). See id. at 114. The Eleventh Circuit has explained that this requirement for a showing of intentional discrimination means that "[m]ere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause." Id. In fact, "[e]ven arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause." Id. Here, the Plaintiffs have not shown, much less alleged, any intentional discrimination by Sheriff Warren against the Plaintiffs in the application of the Macon County Bingo Rules. Because the Plaintiffs can show neither any intent to discriminate nor any differential treatment of a similarly situated person, the Plaintiffs' equal protection claims must fail as a matter of law, and this Court should grant Sheriff Warren's Motion for Summary Judgment.

CONCLUSION

For the reasons set forth hereinabove, Sheriff Warren is entitled to summary judgment as a matter of law as to all claims asserted against him in this action and said claims are due to be dismissed with prejudice.

Respectfully submitted,

s/Fred D. Gray, Jr.
One of the Attorneys for Defendant,
David Warren, Sheriff of Macon County,
Alabama

Fred D. Gray (GRA022)
Fred D. Gray, Jr. (GRA044)
Gray, Langford, Sapp, McGowan, Gray &
Nathanson
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Facsimile: 334-727-5877
fgray@glsmgn.com
fgrayjr@glsmgn.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following by placing a copy of the same in the United States Mail, with proper postage prepaid, on this the 31st day of May 2007:

Kenneth L. Thomas, Esq.
Ramadanah M. Salaam, Esq.
Thomas, Means, Gillis & Seay
P.O. Box 5058
Montgomery, AL 36103-5058

Gary A. Grasso, Esq.
Adam R. Bowers, Esq.
Grasso Dunleavy, P.C.
7020 County Line Road
Suite 100
Burr Ridge, IL 60527

s/Fred D. Gray, Jr.
OF COUNSEL